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No. 79-234

In the Supreme Court of the United States

OCTOBER TERM, 1979

OLD NATIONAL BANK IN EVANSVILLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARJORIE L. VIEHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530

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The sole question presented in this estate tax case is whether the decision below correctly held that petitioner could not maintain this suit for refund because it had not filed a timely claim for refund of the estate taxes at issue.

The pertinent facts are undisputed and may be summarized as follows: Petitioner, as the personal representative of the estate of Marjorie Viehe, filed an estate tax return on July 7, 1972. The return showed a net tax due, and petitioner enclosed a check in payment of this amount with the return (Pet. App. 25). The estate included property acquired from the estate of Mrs. Viehe's husband, who had predeceased her. On February 1, 1974, petitioner discovered that certain bank account overdrafts by decedent's husband had not been properly

taken into account in the valuation of his estate, and that this omission had, in turn, resulted in an overvaluation of the decedent's estate (Pet. App. 16, 25-26).

On July 29, 1975, petitioner filed a claim for refund of estate taxes based upon that fact (Pet. App. 16, 26). The Commissioner of Internal Revenue disallowed the claim because it had not been filed within the period prescribed by Section 6511(a) of the Internal Revenue Code of 1954 (26 U.S.C.), which requires that a claim for refund of taxes be made "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later" (Pet. App. 16).

Petitioner thereupon instituted the present suit in the United States District Court for the Southern District of Indiana. It took the position that the period for filing its claim for refund did not begin to run until it had discovered the facts concerning the overvaluation of decedent's estate and, in the alternative, that payment of the taxes in question did not occur, for purposes of Section 6511(a), until the Commissioner had formally assessed the amount shown as due on the return and remitted with the return to the Internal Revenue Service. The district court dismissed the complaint on the ground that a timely refund claim, as required under Section 7422 of the Code, had not been filed (Pet. App. 26-29). The court of appeals affirmed (Pet. App. 14, 16-24).

1. Petitioner does not renew its contention in the courts below that the limitations period under Section 6511(a) of the Code did not begin to run until it had discovered the facts underlying its refund claim.[1] Instead, petitioner

[1]As the court of appeals noted (Pet. App. 19-24), such a contention is contrary to both the language of the statute and relevant case law (see, *e.g.*, *United States* v. *Zacks*, 375 U.S. 59 (1963), and *Kreiger* v. *United States*, 539 F. 2d 317 (3d Cir. 1976)). Moreover, there is no

argues only (Pet. 4-9) that payment was not made, for purposes of Section 6511(a), until the Commissioner formally assessed the taxes reported as due on the return and remitted with the return and that it was entitled to a remand to establish whether the formal assessment had been made within two years prior to the filing of its refund claim. It has been uniformly held, however, that "payment" takes place in such circumstances when the taxpayer files a return and remits the amount shown to be due on the return. See *Ameel* v. *United States*, 426 F. 2d 1270, 1272 (6th Cir. 1970); *Hill* v. *United States*, 263 F. 2d 885, 886-887 (3d Cir. 1959); *United States* v. *Dubuque Packing Co.*, 233 F. 2d 453, 459 (8th Cir. 1956); *Charles Leich & Co.* v. *United States*, 329 F. 2d 649, 652 (Ct. Cl. 1964).

Rosenman v. *United States*, 323 U.S. 658 (1945), upon which petitioner relies (Pet. 4-6), does not support petitioner's argument. In *Rosenman*, the executors had obtained an extension of time for filing the estate tax return, but not for paying the tax. In order to avoid interest and penalties, they delivered to the Commissioner an amount in excess of the tax that was thereafter reported as due on the estate tax return. The Commissioner placed these funds in a suspense account to the credit of the estate and thereafter applied them, first, to the liability assessed under the return and, then, to the deficiency later assessed on audit of that return. In determining the timeliness of refund claims filed on behalf of the estate under a statutory predecessor to Section 6511(a) of the 1954 Code, the Court held that the original

equitable basis for such a claim on the facts of this case because petitioner had well over a year, after it had discovered the pertinent facts, in which it might have filed a timely claim.

delivery of funds was only a "deposit" and not a "payment." In the Court's view, "the taxpayer did not discharge what he deemed a liability nor pay one that was asserted," but advanced funds as "merely an interim arrangement to cover whatever contingencies the future might define." 323 U.S. at 662. The Court therefore concluded that "payment" did not occur until the balance credited to the estate in the suspense account was applied to the assessed liabilities. Here, on the other hand, it cannot be said that the petitioner's remittance of funds covering the amount due on the return was merely a "deposit" to cover liabilities that might be defined in the future. Since petitioner did in fact discharge "what [it] deemed a liability" (323 U.S. at 662)—*viz.*, the amount shown due on its return—*Rosenman* furnishes no basis for arguing that the limitations period under Section 6511(a) would not begin to run until the Commissioner formally assessed that liability.

2. Contrary to petitioner's further argument (Pet. 9-12), *Thomas* v. *Mercantile Nat. Bank at Dallas*, 204 F. 2d 943 (5th Cir. 1953), does not conflict with the decision below. There, a deficiency in taxes was determined by the Commissioner and satisfied by the taxpayer prior to its assessment. As in *Rosenman*, the court held that the delivery of funds constituted only an "advance deposit to cover additional tax liability expected to arise thereafter" (204 F. 2d at 944). It therefore concluded that no "payment" was made until the liability had been established by entry of the deficiency assessment. That holding was apparently grounded on the fact that the taxpayer was not actually required to pay the deficiency in taxes until the deficiency was formally assessed. But where, as here, the taxpayer computes its tax liability on its return, the tax so computed must be paid when the return is filed regardless of whether there has been an

assessment. Section 6151(a). As the court of appeals below noted (Pet. App. 22), *Mercantile Nat. Bank* is inapposite since the tax liability satisfied here did not arise from a deficiency asserted by the government, but was instead shown to be due by the estate on its return.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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